EAST ASIATIC COMPANY (M) BHD. v. KAMANIS SDN. BHD.

[O.C.J. (George J.) November 9, 1984 & March 7 & 9, 1985]

[Kuala Lumpur – Suit No. C944 of 1982]

Practice and Procedure – Application for extension of time to appeal against default judgment – Whether bona fide reasonable defence disclosed to justify extension.

Contract – Sale of goods – Buyer in arrears of monthly instalments – Counterclaim – No clear evidence of counterclaim – Dismissal of counterclaim.

In this case the plaintiff claimed $137,376.44 for goods sold and delivered to the defendants. Payment was to be made in specified monthly instalments to the end that the whole amount would have been settled by December 1981. However, none of the instalments were paid. The Writ and the Statement of Claim were served on the defendants on June 12, 1982. When a Statement of Defence was not filed and delivered within the 14 days after appearance had been entered the plaintiffs entered judgment in default of defence on August 12, 1982. On September 1, 1982 a summons was taken out by M/s Hisham, Sobri and Kadir who had on that day filed a notice of their appointment as solicitors for the defendants. By that summons the defendants sought to have the default judgment set aside and asked for leave to properly enter an appearance to the writ and for leave to file a defence. They also asked for a stay of execution of the default judgment.

The summons was heard and disposed of in chambers on November 10, 1983 and dismissed with costs. On December 9, 1983 a firm of solicitors called M/s Chooi & Ong filed a notice of change of solicitors giving notice that they had taken over the conduct of the matter for the defendants. On January 3, 1984 they filed an application seeking an extension of time so that the defendants could pursue with an appeal to have the default judgment set aside.

Held, dismissing the appeal: the application failed because the defendant company had not disclosed a *bona fide* reasonable defence.

[*Editorial Note:* The defendant had appealed against the above decision and a Notice of Appeal was filed on December 28, 1984 in Federal Court Civil Appeal No. 331 of 1984].

CIVIL SUIT.

P. S. Ranjan for the defendants/applicants.

Foo Yet Ngo for the plaintiffs/respondents.

Cur. Adv. Vult.

George J.: The plaintiffs' claim was for $137,376.44 for goods sold and delivered which amount it was alleged the defendants were to pay to the plaintiffs in certain specified monthly instalments to the end that the whole amount would have been settled by December 1981. None of the instalments were paid and the writ was caused to be issued on May 25, 1982 claiming the said amount, interest at the rate of 1% per month on instalments as from the date they were due and payable and costs.

The writ and the statement of claim were served on the defendants on June 12, 1982. The defendants purported to enter an appearance to the writ on June 18, 1982 "by its Director". The plaintiffs did not take issue on the contravention of Order 12 rule 1(2) of the Rules of the High Court but when a statement of defence was not filed and delivered within the 14 days allowed for that purpose, at their instance, judgment in default of defence was entered on August 12, 1982.

On September 1, 1982 a summons was taken out by M/s. Hisham, Sobri & Kadir who had on that day filed a notice of their appointment as solicitors for the defendants. By that summons the defendants sought to have the default judgment set aside and asked for leave to properly enter an appearance to the writ and for leave to file a defence. They also asked for stay of execution of the default judgment.

The application was supported by the affidavit of Muhammad bin Haji Awang, the Managing Director of the defendant company, affirmed on the August 27, 1982. In the affidavit in effect the deponent did not dispute the claim of the plaintiffs but contended that the defendants have a counterclaim for breach of an agreement said to be dated June 25, 1980 under which the deponent was to "operate a showroom". The agreement was not exhibited. The summons was heard and disposed of in chambers on November 10, 1983 in the presence of counsel for each side. It was dismissed with costs. However, the order in respect of the payment of interest was varied in favour of the applicants/defendants.

What next happened as far as the Court was involved in, was that on December 9, 1983, a firm of solicitors called M/s. Chooi & Ong filed a notice of change of solicitors giving notice that they had taken over the conduct of the matter for the defendants. On January 3, 1984 they filed an application (enclosure 18 in the Court file) seeking an extension of time so that the defendants could pursue with an appeal against the Court's said decision made on November 10, 1983 dismissing

the defendants' application to have the judgment in default set aside.

The application was supported by a number of affidavits. The first of these was that of Muhammad bin Haji Awang, the Managing Director of the defendant company affirmed on January 3, 1984. No explanation was given in this affidavit for the defendants not taking the prescribed steps leading to an appeal against the decision of the Court given on November 10, 1983. For the first time the quantum of the plaintiffs' claim was challenged. The deponent claimed that as the defendants' audited accounts showed that only $89,613.80 was owing to the plaintiffs, there was a triable issue. It is significant that the defendants tried to but failed to get the plaintiffs to confirm that it was only $89,613.80 that was owing. The deponent then went on to specifically challenge 6 items from the itemised detailed statement of the plaintiffs in respect of the defendants in which dates and invoice numbers were given in respect of each item. Those 6 items in aggregate amount to some $3,000.00 and the deponents challenge of them is feeble to say the least: "I am certain that these underlined items are not on account of goods." None of the other 70 odd items in the detailed statement of the plaintiffs was challenged.

The second affidavit was also that of the Managing Director of the defendant company and was affirmed on February 25, 1984. In this affidavit the delay in taking steps to appeal against the decision of November 10, 1983 is explained. The deponent blamed his erstwhile solicitors who had apparently not informed the defendant company of the outcome of the application. He then referred to the execution proceedings commenced by the plaintiffs and stated that at that stage the Managing Director of the plaintiffs was prepared to accept $89,000.00 in full and final settlement but that later the plaintiffs insisted on the full amount and interest.

The final affidavit of the said Managing Director of the defendant company was affirmed on the May 25, 1984 to which was at last exhibited the agreement of June 25, 1980. In his affidavit the deponent talked about information he had obtained in early 1984 including something called a "Data Listing Folder" which apparently "clearly indicates that the plaintiffs' transactions sabotaged the defendants' market". The so-called Data Listing Folder was not shown to the Court and accordingly the Court was deprived of the benefit of the "clear indication". Again the items of the claim of the plaintiffs for goods sold and delivered were not attacked. The thrust of this affidavit again was that the defendants have a counterclaim in excess of the plaintiffs' claim.

That the Managing Director of the defendants was certain in his own mind that those 6 items were not on account for goods cannot provide a defence or even the basis for a defence. In the face of the detailed statement of the plaintiffs which condescended into particulars of dates and numbers of invoices, the bald statement that the audited accounts of the defendants show that a lesser amount was owing to the plaintiffs than that claimed by the plaintiffs cannot be said to provide a defence.

In my judgment the defendant company had not disclosed a *bona fide* reasonable defence. In fact the affidavits filed on behalf of the defendants demonstrate that there is no such defence available to be disclosed. In the event there was no point in allowing the defendants to take the matter further. Without an affidavit of merits the application was bound to fail. The application was dismissed with costs.

Application dismissed.

Solicitors : *Ng Ek Teong & Partners; Shearn Delamore & Co.*

SUCI MATHEWS v. THOMAS MATHEWS

[O.C.J. (Vohrah J.) March 20, 1985]

[Kuala Lumpur – Divorce Petition No. 177 of 1975]

Family law – Divorce – Death of respondent after decree nisi and before decree absolute – Death not known to petitioner – Decree nisi made absolute – Setting aside decree absolute – Divorce and Matrimonial Proceedings Rules 1980, r.53 – Law Reform (Marriage and Divorce) Act, 1976, s.74.

The petitioner obtained a decree *nisi* for dissolution of her marriage to the respondent. Some two years after the decree *nisi* the respondent died but this fact apparently was not known to the then solicitors for the petitioner who applied to the court under rule 53 of the Divorce and Matrimonial Proceedings Rules 1980 for the decree *nisi* to be made absolute, which application was accordingly granted. Subsequently, the petitioner applied to set aside the decree absolute.

Held: as the marriage of the parties was dissolved by death, the petitioner became a widow and the subsequent